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No. 95-1472

Supreme Court, U.S.
FILED
MAY 14 1996

In The

Supreme Court of the United States

October Term, 1995

LORETTA KLUMP,

Petitioner,

vs.

J. DAVID DUFFUS, JR., LAW OFFICES OF DIXON, DUFFUS & DOUB, A PARTNERSHIP and ACCIDENT AND INJURY REFERRAL SERVICE,

Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Seventh Judicial Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI FAILS TO IDENTIFY ANY COMPELLING REASON FOR THIS COURT TO ISSUE THE WRIT AND PROVIDE PETITIONER WITH ANOTHER REVIEW OF THE DISTRICT COURT'S TRIAL ERRORS.

Petitions for writ of certiorari are granted only for compelling reasons. Sup. Ct. R. 10. A review on a writ of certiorari is not a matter of right, but is directed to the discretion of the Supreme Court. *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70 (1955). The Supreme Court has determined that the jurisdiction given by statute should be exercised sparingly and with caution. 28 U.S.C. § 1254(1); *American Constr. Co. v. Jacksonville, T.& K. W. Ry.*, 148 U.S. 372, 383 (1893); *In re Woods*, 143 U.S. 202 (1892). The writ will not issue merely to accord another hearing to a party defeated in the court of appeals. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Principally, certiorari jurisdiction is used to resolve conflicts among circuit court of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10.

No federal question was decided against petitioner in this case. There was certainly no departure from the accepted and usual course of judicial proceedings to invoke the need for this Court's supervisory powers. *See* Sup. Ct. R. 10(a). There are no compelling reasons to grant this petition for writ of certiorari. The court of appeals correctly applied Illinois tort law concerning the amount of damages proximately caused by respondents' failure to file a timely lawsuit for Klump's injuries resulting from an automobile accident. *Klump v. Duffus*, 71 F.3d 1368 (7th Cir. 1995). The court ruled that the burden is on plaintiff in a legal malpractice claim "to prove the amount she

would have actually collected from the original tortfeasor" had the malpractice not occurred. *Klump*, 71 F.3d at 1374.

Petitioner asserts that her petition should be granted because the Circuit Court of Appeals for the Seventh Circuit misinterpreted a decision of an intermediate appellate court of Illinois. (Petition, pp.5-6). A reading of *Goldzier v. Poole*, 82 Ill. App. 469 (1899) shows that the circuit court of appeals did not misinterpret Illinois law concerning damages in a legal malpractice case and, in fact, gave the *Goldzier* opinion the logical interpretation consistent with its language and consistent with the subsequent Illinois appellate court cases of *Shepard v. Krol*, 218 Ill. App. 3d 254, 260, 578 N.E. 2d 212, 216 (1991) and *Kohler v. Woollen, Brown & Hawkins*, 15 Ill. App. 3d 455, 458, 304 N.E. 2d 677, 678 (1973). *Klump*, 71 F.3d at 1374. Petitioner's argument that the decision of the circuit court of appeals was a departure from "clear Illinois authority" (Petition, p.12) is disingenuous because she also admits that the "actual injury" language in *Goldzier* is capable of two different interpretations, one of which supports the reasoning of the circuit court of appeals. (Petition, p.7).

The court of appeals correctly observed that the holding of *Goldzier* never reached the issue presented in this case where an underlying tortfeasor is only partially able to satisfy a hypothetical judgment against him. A federal court sitting in diversity, as in the instant case, is bound to decide questions of law in accordance with its determination of how the highest court of the applicable state would decide such issues. *Aetna Casualty & Sur. v. Farrell*, 855 F.2d 146, 148 (3d Cir. 1988); *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1264 (3d Cir. 1991). Applying that accepted rule of construction, the circuit court of appeals was justified in reviewing Illinois authorities, including *Goldzier*, as well as the law of other jurisdictions in determining the law applicable to this case. Petitioner does not contest that every

other state or federal court which has decided the issue has found that damages are limited to the extent that the underlying hypothetical judgment is collectible. Further, petitioner does not contest that all courts considering the issue, except for one decision in Maine, places the burden to prove the amount collectible upon the plaintiff. *See Klump*, 71 F.3d at 1374. Petitioner merely argues that the numerous and uniform decisions from other jurisdictions should be ignored. (Petition, p. 12).

Contrary to the suggestion by petitioner, the *Klump* opinion does not involve "the regulation of the practice of law." (Petition, p. 6). Petitioner's suit in the district court was a suit for tort damages and does not concern the regulation of the practice of law.

Petitioner's statement that clients who sue their lawyers in federal courts in Illinois have a "more complex burden of proof" than those who sue in Illinois state courts is untrue. (Petition, p. 6). The court, citing Joseph H. Koffier, *Legal Malpractice Damages in a Trial Without a Trial — A Critical Analysis of Unique Concepts: Areas of Unconstitutionality*, 73 Marq. L. Rev. 40, 52 (1989), observed that placing the burden on the plaintiff to prove collectibility made malpractice conceptually identical to all other negligence cases. *Klump*, 71 F.3d at 1374. Petitioner's confession that it is impossible for her to prove damages in this case (Petition, p. 11) is no reason to abandon basic tort principles.

The court of appeals correctly noted that the purpose of damages in a tort action is to place the plaintiff in the same position she would have been in had the tort not occurred. The court further noted that if the tort had not occurred petitioner would have obtained a judgment against the underlying tortfeasor, but her recovery, and thus her actual damages in the

malpractice action, would have been limited to the amount she was able to collect. *Klump*, 71 F.3d at 1374. In any event, petitioner did not raise the issues relating to the difficulty of proving collectibility before the court of appeals issued its opinion and she cannot raise them now. (Petition, p. 11).

Pursuant to Supreme Court Rule 15.2, respondents advise the Court that petitioners' assertion that respondents do not suggest Klump was injured less than would justify the $474,000 she was awarded (Petition, p.7) is untrue. Respondents strongly contested petitioner's claimed injuries and damages at trial and on appeal urged several trial errors relating to the evidence concerning alleged damages and the violations of the orders in limine by petitioner's counsel in closing argument which had the effect of increasing the amount of damages awarded. The court of appeals stated it would not address those errors concerning the amount of damage the jury awarded because it was remanding the case for a new trial. *Klump*, 71 F.3d at 1375 n. 9.

CONCLUSION

The Circuit Court of Appeals for the Seventh Circuit considered the record on appeal and the briefs of the parties and drafted a well-reasoned opinion. Petitioner's Petition for Rehearing *En Banc* was presented and denied. A proper construction of the *Goldzier* decision, other Illinois cases, the overwhelming weight of authority from other jurisdictions, and the principles of tort damages establish not only that no compelling reason exists for further review, but also that the court of appeals decision is unquestionably correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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